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When King Solomon ordained that the disputed infant be divided in two parts,[1] his decree finally accomplished what his judicial wisdom could not—the revelation of the identity of the true mother. By yielding her claim, she exhibited an altruistic concern that could only belong to a "psychological" parent, in the modern terminology of Goldstein, Freud, and Solnit;[2] the ancients were content to infer the biological from the psychological fact. One might call this a case of "coerced altruism," the odor of paradox being explained by the irony of using the legal process to produce the crucial datum that is supposed to be the foundation of judgment, instead of its outcome.

This way of looking at the matter draws attention to the morphological similarity between King Solomon's case and the equally ancient joke Woody Allen uses to introduce the movie *Annie Hall*. He says he would not belong to any club that would consider him worthy of membership. In a legal setting, consider the value of deciding a modern custody contest on the consideration that any parent who would insist upon disputing the child's custodial status quo by exposing him or herself and the child to the traumas, delays, disturbances, and expenses of the legal process, demonstrates a selfish, monomaniacal character inconsistent with an objective understanding of a child's true "best interests." This example may be the most deliciously paradoxical form of a

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1. 1 KINGS 3:16-28.

2. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

general pattern commonly called *Catch-22* after the Joseph Heller novel.

The analysis of legal doctrines to reveal a *Catch-22* in their logic, or operating unconsciously to constrain the options of policymakers, is a popular tactic of the classroom Socratist. It is almost always good either for a laugh or for the enlistment of a righteous and reformative indignation, as circumstances dictate. The object of the following reflections is to consider whether the discovery of a *Catch-22* situation should be the end instead of the beginning of analysis. In viewing the prevalent kinds of such paradoxes, we first shall find that there is nothing logically untenable or intrinsically absurd in the way they are used. We then will establish the common features and purposes that underlie such legal ironies. In so doing, we may be able to distinguish new kinds of legal imperatives, unstated functions assigned to the courts. Finally, we may use the lessons of this critical exercise to analyze broadly the functions of reflexivity and feedback in the way legal doctrines are stated and applied.

I. Paradox or Trap for the Unwary

Unstated Content of Legal Rules

Taking for a simple paradigm the custody example with which this discussion began, one might be tempted to express consternation if told that the rule is: *by claiming (exercising) rights, one thereby waives them.* That is to say, by claiming to be the fitter parent, one demonstrates *ceteris paribus* that one is relatively unfit—fitness being defined as an altruism that goes far to avoid a custody fight. It is not here claimed that any American jurisdiction uses such a positive rule, but the vagueness of the "best interest" standard is enough to conceal deliberative motives that might indeed operate as if this were the rule in some cases. In all events, this instance is not far off the English rule[3] that consent to a step-parent adoption may be implied from the natural parent's refusal to concur when a caring parent would do so.

A similar cause for bewildered disbelief is found in the teaching of *York v. Texas*.[4] That case established that state procedure need make no provision for a special appearance in order to safeguard the constitutional rights of individuals threatened with a jurisdictionally invalid civil judgment. There is no right to argue to a court that it has no power over the defendant making that argument. Appearing is an act

3. *See In re* W., [1971] 2 All E.R. 49.
4. 137 U.S. 15 (1890).

of consent to jurisdiction even if the consent takes the form of an argument that no jurisdiction exists. This rule is justified by the view that there are alternative and fully equivalent protections for the property of the victim of a void judgment. By using them, such victims do not suffer the embarrassing appearance of giving the same act the dual legal significance of objection and acquiescence. The absurdity and harshness of positive rules that define objection as acquiescence have led Texas[5] and other jurisdictions to adopt procedures that permit direct challenges of personal jurisdiction, but the principle of *York* has never been recanted.

Procedural law affords many similar instances of rules that defeat their intended instrumental purposes simply by being invoked. Indeed, the central and most universal issue in procedural law is one of ends and means that can be stated as a puzzle: How can rules be formulated that may be maintained and observed at a cost that will not dwarf or duplicate the substantive dispute they are meant merely to orchestrate? The procedurist's nightmare is the quandary of stating or enforcing a rule in a way that can only produce a controversy requiring an evidentiary hearing involving every element of the case to be considered at trial. For instance, a motion to dismiss on grounds of forum non conveniens because all of the evidence and rules are more handily available elsewhere may entail a showing of what the evidence is, who the witnesses are, and so forth. Often the verbal form of the rule will draw distinctions that hide or minimize its tendency to invite a plenary trial as a condition of its implementation. The adoption, however, of rules that are recursive in fact, is the result of hard choices. It may be the epitome of frustration in the sphere of law. Certainly, the existence of such rules poses hard choices for those whom they govern.

What is most striking in the situations we have been describing is the ambivalent status of an unequivocal act. Something close to a contradiction is involved in the discovery that, in these self-referent processes, there is no neat grid of Hohfeldian correlatives[6] upon which to plot relationships between the opposing values in a single act. A short schedule of near-equivalencies will be enough to illustrate the reality of this problem: seeking custody = proving, *pro tanto*, unfitness; appearing = consenting to jurisdiction by disputing it.

Formally, the most typical manifestation of the difficulty is the statement of a rule in the normal legal manner of antecedent and con-

5. *See* TEX. R. CIV. P. 120(a).
6. *See* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923).

sequent ("Whoever shall X, shall suffer Y to the extent of Z . . .") but with the true sequence reversed. What seems to be a condition of relief or a ground for a remedy is, operationally speaking, a consequence of proofs—proofs that verbally are supposed to follow, rather than precede, the existence of the Hohfeldian "right." The trouble here is more than a matter of grammar, however, and no rearrangement of legal carts and horses will resolve the dilemmas faced by actors and advisors confronted with a *Catch—22*. The fact that we are dealing with ambivalence rather than ambiguity is shown by a slight revision in our schedule of quandaries:

1. At one level, a person with "rights" has the option of:
   seeking custody
   appearing with reservations
   pleading alternatively
2. But at a second level, the "right" is qualified by:
   inference of unfitness
   "power" to override reservations
   looking "undecided," inconsistent

The temptation to dismiss these doctrinal antinomies is strong when they are formulated in the manner we have been using for purposes of illustration. It is too easy to say that the costs and qualifications that accompany the exercise of a right are only its natural inconveniences: by-products of choice; aspects of the human dilemma; footnotes to Frost.[7] The concept of a "natural" limitation is not the issue, however, when the real problem is that the statement of a legal entitlement simply is incomplete. There also is always a question of whether the qualification *must* be linked to the "right," particularly as regards a strong right that is the outcome of a long policy battle (the decision, for example, to permit alternative and hypothetical pleading).[8] There is, finally, a question of honesty in concealing the detriments that inseparably accompany a clearly stated legal right.

Loops, Reversals, Hitches

Now, with more attention to forms, let us consider whether a *Catch-22* is to be found in every instance where the smooth sequence running from entitlement to remedy is intercepted by an intrinsic proviso. The case of the self-defeating custody contestant is in many ways the strongest type of a larger class, because it seems to exemplify a legal

7. Frost, *The Road Not Taken*, in ANTHOLOGY OF FAMOUS ENGLISH AND AMERICAN POETRY 748 (Benet & Aiken eds. 1945).

8. *See* C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 42 (2d ed. 1947).

version of the esthetic doctrine, more is less. The harder you fight, the less you get (the worse you look). An image suggests itself for this kind of rule—the metaphor not of the Catch, but of the Loop. One is confronted with a circularity, but the prospect need not be stultifying. Prudent counsel treats the rule as one requiring wisdom in order to know how far one may go before one's position begins to double back on itself. Blind zeal can stretch the Loop so taut that it describes the trajectory of a boomerang. The trouble with a Loop is that it may become indistinguishable from a noose: a trap for the unwary. The petitioner for custody is invited to participate in a contest that is at the same time an experiment, with the petitioner as its unconscious subject. To reveal the covert importance of the petitioner's overt claims would spoil the rule entirely by defeating its Solomonic function.

Family law furnishes another instance of frustration that again serves as a paradigm, allowing the introduction of another metaphor, the Reversal. Consider the predicament of the abandoned wife seeking an injunction to prevent her departing husband from regaining his single status either in Reno or in Port-au-Prince. If she fears an ex parte Reno divorce, she can easily show that her remedy at law by way of a collateral attack on the Nevada judgment is so slender under the doctrine of *Williams v. North Carolina (II)*[9] as to be "inadequate." If her fears, however, turn on a Haitian "quickie," with no full faith and credit clause behind it, she will fail to show the inadequacy of a subsequent direct legal attack on the decree as a sham.[10] As Professor Clark has noted,[11] the more feeble the jurisdictional basis of the threatened ex parte decree, the greater is the need for protection, and, at the same time, the more feeble are the rights of the stay-at-home to prevent it. The choice of the husband conceivably could be influenced by an aversion to the effects of a home-state injunction, leading him to prefer Haiti—a result at cross-purposes with any rational policy we might ascribe to the authors of our jurisdictional rules on divorce. The wife, as holder of a claim for equitable protection, finds herself in a dilemma not of her own making, in that she has no control over the venue her husband may choose for claiming his phony domicile.

The dilemma of the stay-at-home spouse seems to be the outcome of a rule produced by two policies tugging in different directions.

9. 325 U.S. 226 (1945) (party challenging an *ex parte* sister-state divorce decree must show that the spouse who obtained the decree did not have valid domicile in the sister state and that such state's finding of domicile was erroneous).

10. *See, e.g.*, Arpels v. Arpels, 8 N.Y.2d 339, 170 N.E.2d 670, 207 N.Y.S.2d 663 (1960).

11. H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS 601 (2d ed. 1974).

There is a background realization that injunctive relief is usually futile in such cases, but in the foreground there is an announced concern for the maxim that equity will act only in the absence of an adequate legal remedy. Again, in the background there is a universal nonjudicially noticed appreciation that ex parte divorce decrees are jurisidictionally vulnerable on account of phony claims of domicile used to secure them. In the foreground, there is an understanding of the difficulty of bringing the situation into the field of judicial cognizance and of the consequent "irreparable" hardship that may be visited upon the stay-at-home.

It is not necessary to canvass further the policy aspects of this case. What we need from it is not the optimal solution but an image of the type of jam that the conflicting considerations of policy have produced. More becomes less in the present example in this way: the stronger the need, the weaker the prospects for success. This paradox amounts to more than a Catch and is distinct from a Loop. It is rather like the torture of Tantalus, whose increasing thirst reduced the level of the stream in which he stood, and whose increasing hunger elevated the fruit-laden bough that hung just above his reach. As the victim of such arrangements has no choice, we must call this case a delusion, rather than a snare. The delusion, however, is only an occasional source of disappointment, or else the promise of relief would be quite transparent and never fool anybody. Pennsylvania wives have, in fact, obtained injunctions against Nevada-bound mates.[12] The trick here is that when one carries the rationale for relief to its logical consequence, in a straightforward argument a fortiori, there is apt to be a sudden and total reversal of the consequences. A crying need suddenly looks to the decisionmaker like a clear case at law. The polarity of the argument has changed, like the optical illusion created by those geometrical boxes that are sometimes top-uppermost and sometimes bottom-uppermost when projected onto the plane of a sheet of paper.

If it were possible to freeze the box in one of its orientations, then we quite literally would know where we stand in the field of three dimensions that our perceptual apparatus constructs from such images. It is impossible to do so, and there is room for more than a suspicion that a similar reversing polarity sometimes distorts the faculty of judgment.[13] No amount of wariness provides a path to escape Reversal

12. *See, e.g.*, Monihan v. Monihan, 438 Pa. 380, 264 A.2d 653 (1970).

13. See the discussion of Newcomb's paradox at note 28 *infra*.

traps. A legal claim at one moment seems to have a favorable significance and at the next an unfavorable one.

The outlines of doctrine, however, remain simple and clear. No confusion exists about the facts, nor about their moral and legal import in matters like that of the absconding husband; yet one must remain in doubt as to the outcome of a case based on them. What best accounts for this conundrum is a matter of considerable mystery. Let it suffice for the moment to note that the value of a state of affairs, from a legal perspective, is precisely and unambiguously correlated with a rule, producing a "right" (or a "no right") in the simplest version of the Hohfeldian schema. There is, however, a hidden switch, a gate, that sometimes connects the case proven with "no right" and at other times with "right." This "contradiction" is apparent and not real because only one position of the switch is possible at a given moment. But it is not a happy state of affairs.

A Loop, on the other hand, can be felicitous. A petitioner faced with a Loop may through wariness outwit the rulemaker. The party has only to observe how far to go before the case becomes self-defeating. The rule appears to offer a continuous series of options: the pleader may go farther and farther, seeming to progress as he cumulates his proofs, yet suddenly encounter his footprints in the sand. Such rules are considered unhealthy by psychologists. Parents and children are aware of the elements of this form of social control. It has for its object a lesson in moderation and is, therefore, antithetical to traditional legal concern with spheres of absolute autonomy.[14] Success, in the sense of achievement of one's maximal entitlement becomes a matter of compromise or of adjustment. A vignette treating the courtroom as a playpen may illustrate the point:

> "May it please the court, I am the better custodian for my child."
>
> "Petition denied."
>
> "May it *pretty* please the court, I really want that child!"
>
> "Hmm, here is a really caring parent . . . . However, petition denied."
>
> "May it pretty please the court with *sugar* on it, we need each other!"

14. The mode of legal thought that Professor Duncan Kennedy describes as "classic" (in a work itself of that caliber) emphasizes the importance of "spheres." The present notes, while owing much to Kennedy's descriptive scheme, subordinate a review of the change from classic to modern ideology of law in favor of the present effort to describe what underlies both styles and provides continuity between them. *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1725-37 (1976).

"Blinded by zeal, this petitioner is unable to take the larger view . . . ."

Petitioners soon learn from this process of character-building that if they are to be given any chance at all, they had better stop somewhere near midpoint.

The Loop and the Reversal are not the only major species of the genus we have designated *Catch-22*. To complete our rough tabulation of the field, we must consider the Hitch. When a trial judge uses his power of remittitur, the loser of a jury verdict obtains a conditional right to a new trial.[15] Let us suppose the judge has acted abusively or erroneously in ordering the remittitur—that both winner and loser see reversal as the probable result on appeal. The prudent maximizer interprets this situation as an instance of necessity. A discount must be offered to the holder of the conditional new trial order, not as large as that which the judge specified, perhaps, but of the same order of magnitude as the costs of refusing to remit "the excess" in the verdict, going through a second trial, risking a defeat or a lower award therein, appealing the resulting judgment, gaining a reversal, and then, ultimately, collecting on the original verdict.

The verdict winner has a right to pursue matters through all of these steps,[16] but remittitur is intended to be, and is, coercive because the right is of value chiefly or even exclusively as an economic counter. If the law were intent upon treating the issue of its propriety with strict impartiality, it would be necessary to allow a verdict winner who finally establishes the "adequacy" of the original damage award an additional sum, above the normal "costs of appeal," to be measured by the interest on the judgment that ought to have been entered promptly after rendition of the first verdict, plus a premium value for the exposure to loss occasioned by the failure to remit damages as invited by the trial judge, plus, of course, fees to counsel for the second trial. Only such an approach would have promise of making the choice whether or not to remit some of the verdict a "free" one.[17]

This description of remittitur is not intended as a challenge to the policy embodied in that practice. Rather, it is the element of fiction in the structure of remittitur that justifies it being singled out as an example of the Hitch, suitable for generalization and application to like cases in the class.

15. *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474 (1935).

16. *See* Note, *Appealability of Judgments Entered Pursuant to Remittiturs in Federal Courts*, 1975 DUKE L.J. 1150.

17. *Id.* at 1156.

A Hitch begins with a simple finding, entailing a clear and positive consequence; for example, the present verdict may be so high that it must be inferred that the jury was carried away by sympathy, passion, and prejudice; therefore, the motion for a new trial is granted. However, the granting of the motion is then made conditional in accordance with a suppressed minor premise. It is supposed that the extent of the distortions produced by that inferential passion and prejudice can be quantified, stated, and made the subject of a second clause: the granting of the new trial is ordered *unless* there should be an agreement to accept the estimation of the judge regarding the amount of the "excess."[18]

From the viewpoint of the verdict-loser, who was given a new trial in the first breath, the placing, in the second breath, of the efficacy of the new trial order entirely within the control of the verdict-winner is a major Hitch, that the loser is helpless to obviate. The consequence of the finding of "passion or prejudice" is somehow deflected in order to generate coercive power against the verdict-winner. The winner's power to accept or reject the judge's offer of a lesser judgment is considered to be a sensible way to compensate for the pressure to discount the claim, as noted above. The Hitch thus can be seen as an artful way of transforming the court into a bargaining agent, as well as an arbiter of legal differences, so that the dual roles can be employed to save the bother and expense of relitigation.

The Function of Paradoxical Rules

Each of the cases we have considered presents an example of the transformation of a legal antithesis—a polarized, black/white issue—into a mediating principle. The virtue of mediating principles is that they provide a cover of rationality and tradition to conceal the process of incremental change that goes on as the decision-maker is forced to take more matters into account than were contemplated when rules were originally written.

The Loop is a pure instance of an either/or decision being grounded upon an intuitive and cumulative impression of more-or-less. The Reversal is an instance of legal clarity (that is, polarity) being retained, while the polarizing values are hidden—so that identic proofs,

18. The federal guide for sizing the discount is to estimate the "highest maximum which the jury could reasonably find." Gorsalitz v. Olin Mathieson Chem. Corp., 429 F.2d 1033, 1046 (5th Cir. 1970). *But see* Meissner v. Papas, 35 F. Supp. 676, 677 (E.D. Wis. 1940), *aff'd*, 124 F.2d 720 (7th Cir. 1941) (using standard of "lowest amount" that could reasonably be found by the jury).

differing only in the intensity of the impression they create, produce opposing outcomes. Finally, the Hitch, by creating a complication that is extrinsic to the rationale of the polar rule, manages to retain the forms of a branching legal logic while introducing ever-newer levels of parentheses until the desired degree of flexibility is reached.

The necessity in law of such rationalizing styles as the Loop, the Reversal, and the Hitch is neither logical nor political. The appearance of irony or inconsistency could usually be avoided, and often is avoided when brought to consciousness, through a more careful and expansive specification in the positive law of rights and duties—or else through an abandonment of pretense in favor of a frankly administrative, open-ended, and instrumental statement of the functions of the decision-maker. The necessity that dictates that formal statements of law must be studded with Loops, Reversals, and Hitches is a necessity of style. It follows from the retention of legal formalism as the vehicle for stating a regime of administrative flexibility.[19] In order to retain its respect as a transcendent and authoritative writ, a statement of "law" that can govern the individuals who have powers of interpretation must be quite general, rigid, and relatively unqualified.[20] If generalities must be chosen in order to provide the semblance of consistency between cases, the same constraints require the isolation of relatively few determinative circumstances, which then are coupled with governing norms in a manner that indicates a strict entailment. The rhetoric of the syllogism, together with the reality of discretion, produce the distinctive and often amusing spectacle of the Positive Baroque doctrine, rule, or opinion. Its highest ornaments are the Loop, the Reversal, and the Hitch.

There is a further reason for the necessity of such gambits in the discourse of the law. They provide counsel with tangible assignments: theses and antitheses, formal "issues" that are essential to the dialectical forms of our adversary procedure. These features of legal style introduce points of division that facilitate litigation at the same time that they mediate between the positive and negative interpretation of the same circumstances. Mediation is, after all, a division of differences as much as it is a composition of divergencies through finding a point of equilibrium between them.

When passions are high, as they so often are in litigation, and when the rules are clear, the victories total, and the defeats abject, then the mediating principle comes into its glory. Imagine duellists back to

19. *See* F. VON HAYEK, THE CONSTITUTION OF LIBERTY 212-14 (1960); Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143 (1958).

20. L. FULLER, THE MORALITY OF THE LAW 46 (1964).

back, ready to step off their paces. The line between their heels divides the field of their combat arbitrarily but effectively, just as it may give unity to the series of exchanges across the line in a suite of amicable transactions aimed at resolving controversy. In order to accomplish such feats, the intellectual line that we describe as a mediating principle must have the property of being visible in only one aspect at a time. The same principle therefore may serve to integrate and complete the structures of two opposing arguments; it is the party wall of legal order, defining separate domains.

The kinds of duality we have been dealing with arise when the underlying principles are seen from some other or larger perspective than the one chosen by the formulators of doctrine. A Loop, Reversal, or Hitch is rarely a disingenuous dodge. The perceived need for a way to invert or distort the force of an argument may come from private or political motives. More often than not, however, the adoption of one of these devices is honestly believed to be correct—a subtle answer to a crude position, or the explication of a moral nuance hitherto implicit in the course of legal development. The fallibility of orderings in which coherence is purchased at the cost of unconscious irony is not remediable either through increased self-consciousness or through the abandonment of generalized norms. We are condemned to rationalize with the help of principles that seem *to us* adequate for the tasks of relating moral categories to legal fiats, political conceptions to ideas of a prepolitical human nature, legal entitlements to equitable restraints upon their "exercise," and so on, through a vast tabulation of the topics that give living-together its diversity of creed and orientation.

II. Self-Betrayal or Balancing Act?

Each of the examples chosen to illustrate the Loop, the Reversal, and the Hitch presents an instance of how plausibility may turn to speciousness. The sudden awareness of a duality in public policy, or in one's own perception of political or moral consistency, can often be elicited by the forms of *reductio ad absurdum* to which we have given the designations Loop, Reversal, and Hitch. That, however, does not necessarily mean that a duality once recognized will disappear, in the manner of a fallacy exposed. Exposing a "mediating concept" is more likely to result in a reexamination, followed by a restatement of the variable that most directly affects decision. It is true that there may be occasions when the process of reexamination is so long overdue, and the concept reexamined is so fictional or outworn, that a substantial revision in doctrine ensues. The master craftsman of opinion writing,

however, can probably detect and preserve an ideal of justice that works through to sound results even in the most captious instances of legal doublethink.

The result dictated by one concept of justice in domestic relations cases would require, for example, that the abandoned wife be assured that her economic interest in her marriage would be undamaged by an ex parte divorce.[21] If this means revising the law of her domicile on the consequences of such migratory divorces, that issue should be squarely faced,[22] as should the fact of the state's impotence to regulate or prohibit migration for the purpose of securing a divorce. The self-defeating parent seeking custody could be told forthrightly that the "best interest" standard is flexible and that it bends in the direction of "liberal" (or "strict") interpretation when a petitioner invokes it in derogation of the developmental satisfactoriness of the status quo.[23] For the somewhat more complicated issue of remittitur, the "right" to annul a trial judge's order granting a new trial (by the expedient of "consenting" to the judge's assessment of the appropriate level of discount) could be made to appear innocuous.

The awkwardness of coercing "consent" would be corrected by authorizing a defined power at the trial level to impose such a discount, but limited to the magnitude of the expected "overhead" costs of retrial, appellate review, and so on. Each of these sketchy solutions to the problem of justification is a case of looking to a higher level of generality, and a greater degree of candor, in seeking the appropriate place for introducing one's reasons for complicating the enforcement of rather elementary principles of legal morality.

Introducing Feedback into Decisionmaking

The shape of the problems we have been describing is pyramidal. The problems of legal consistency and clarity frequently are matters of articulating one principle upon or in relation to another. This typically leads to a series of premises, with specifications, cross-references, and provisos arranged more or less on the pattern of the Internal Revenue Code, having a master concept like "income" at the summit and a li-

21. *See* Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Estin v. Estin, 334 U.S. 541 (1948).

22. *See* Stambaugh v. Stambaugh, 222 Pa. Super. Ct. 360, 294 A.2d 817 (1972).

23. *See* Vanden Heuvel v. Vanden Heuvel, 254 Iowa 1391, 1405, 121 N.W.2d 216, 224 (1963) (Thompson, J., dissenting) ("In this situation there is an old rule which expresses the commonsense experience of men over the centuries. It is that when we cannot be certain we should leave well enough alone.").

brary at the base. Another view, however, more fittingly applies to situations where the complications of doctrine are not steps in a process leading to an ever-narrowing specification of the precise rule. Instead of exceptions to exceptions in a dendritic thicket of parentheses, what is called for in describing the case of the self-defeating custody petitioner is the simple image of the Loop, with which we began. In more pretentious terms, the law can be said to need at times to introduce a principle of feedback. It must take account of its own accountings and its own effects on primary actors.

It is awkward, and perhaps nearly impossible, in terms of right and corresponding duty or privilege, to describe a justifiable instance of legal feedback. One might say that a parent has the unconditional "right" to the procedural, dignity-respecting, serious, judicial consideration of his or her overall worth, future prospects, and present ability to care for a child, and that this right will be understood and enforced by permitting a parent to file a modification petition at any time the other parent has custody.[24]

The problem is not simply one of having merely a "right" to the honest exercise of an open discretion. There are and there should be cases, of which the self-defeating parent is exemplary, when honest counsel or the public writ of the law provides the citizen with notice that: 1) there is nearly no discretion to grant what may nevertheless freely be requested; and 2) there is no way of stating in advance with accuracy that the case of any particular parent is outside the scope of a discretion that may allow reversal on the issue of best interests of a child. It may be stretching a point to call this kind of discretionary power "legal," as it seems to exemplify a form of domination and an openness to idiosyncrasy that is antithetical to the rule of law.

The chancellor who decides a custody dispute is not, however, an administrator whose guidance is to be found in goals and objectives of public policy. The chancellor is a private dispute-settler, looking to the prospective consequences of decisions, to be sure, but at the same time, we may reasonably hope, looking to a community conscience. The chancellor's official sensibility knows that there are such things in litigants as selfish and hidden drives and motives and that claims of right, when made stridently and with certain kinds of proof too commonly available in a domestic relations context, are dependable evidence of what psychologists call "regression" to a relatively less mature level of

24. Reformists would introduce a period of repose after each custody ruling. *See, e.g.*, UNIFORM MARRIAGE AND DIVORCE ACT § 409.

behavior. If the positive writ of the law confers powers to take account of the very childishness of some types of litigation, that may be a mark of sensitivity, as well as an invitation to abuse.

The fault with such doctrines, and with the image of a feedback loop as a way of organizing our sense of justness, is that they must ultimately discriminate between individuals on the basis of infinitesimal differences. Not only that, but, as the case of the self-defeating parent demonstrates, the basis for such a discrimination either cannot be profitably articulated (of what use is it to tell a citizen, "You are not legally *un*fit, but I find you, on the whole, a vindictive, shallow, immature . . . altogether less worthy claimant than your adversary?") or else, if articulated, will prove to be a matter of grace. We should not look for more candor and more generality in the expression of what may, after all, be sound and achievable goals of interpersonal fairness. Instead, we must take the case of the custody-feedback loop as simply a matter where the adult petitioner is as much exposed to the predilections and personality of the chancellor as to the touchstones of an announced norm. The outcome is, in principle, beyond the control of the litigants—even if they could manufacture whatever evidence they deemed most persuasive—and beyond the prophetic powers of a legalistic analysis.

'Rules' that Conceal Judicial Discretion

There is a shift in the mode, but not in the fact, of principled control in a legal regime with feedback characteristics. Using a "rule" that is variable in ways not directly keyed to evidence, and is, therefore, imprecise, the intelligent advisor (or the careful appellate court) may divine a kind of consistency and even-handedness in results that will afford the paid-for prophets of the bar a basis for prediction as reliable as most black-letter doctrines permit.

The probable outcome in such cases is quite literally observable, as far as it is given to judges and others to "see" the facets of character that constitute the merits of the respective contestants. The range of judicial idiosyncrasy is much broader in principle than it is in practice. Even in principle, however, the discrimination possible under a legal rule like the "best interest" standard, interpreted with plenty of feedback, may be a sound and desirable, authoritative and controlled discretion. The chancellor may be seen to have been duly constituted to act as the public uncle, the embodiment of the moral consensus of the community. If there is no real consensus on the rights and wrongs of entitlement to custody, the failure of the people to posit any "law" for

such cases may indicate a willingness to accept the prevailing doctrine, however absurd it may be to legalistic rationality—tender-years presumptions and the like.[25] Even though rulings based on evaluating individuals—as if the custody contest were an employment interview in which the court were empowered to hire a person to be a parent—conflict with the ideal of the rule of law, an even greater doubt exists as to the propriety of following legal forms for the rendering of the decision.

The exigencies of appellate review require determinations to be made with reference to "findings" based on "evidence" properly included in a "record." In a case involving applications of feedback, this record folds back upon itself and becomes more than the sum of its parts. The aberrant result is not a matter of error, and the occasional reversal should not be regarded as a precedent making "law." The entire system of legal ideology, though, operates to constrain the courts and the bar to stake their positions in the categories of "grounds" and their proofs. Disagreement and reversal in a case where the principle of decision is really a matter of making close calls as a statement of impressionist judgment must therefore implicate the courts as well as the litigants in *personal* disputes with one another. The elaboration of Loops, Hitches, and Reversals is a response to the threat of incivility through a transformation to rule-like forms in order to mask a rule of discretion. This masking is what is meant by "rationalization" in its most pejorative sense.

The example of the Loop, which involves disputants in a dialogue about the shagginess of the shaggy dog at its most fundamental level, is paralleled by the case of the Hitch, which exemplifies the exception that should not be understood as a general qualification on a legal entitlement, to be applied irrespective of person and place. At least in their origins, Hitches have the charm of new discoveries and the genial flavor of the explanation arrived at ad hoc. "Ordinarily, the rule would require X, but in the present case, to order X would be to ———." That is the sort of preamble that goes with Hitches and that contributes, sometimes mightily, to the interstitial development of the common law.

The present essay is not concerned with all Hitch-like doctrines. Our interest is with the Hitch that comes in a pair or is hitched to other Hitches in such a way that we may be reasonably certain that the decision-maker will determine the case in accordance with some inarticu-

25. *See* State v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (Fam. Ct. 1973).

late feedback principle that decides whether the occasion requires applying a simple rule or, to the contrary, the imposition of a Hitch. In its most general form, the Hitch is exemplified by estoppel—more particularly, by that element in estoppel doctrine that resists restatement in definitive form in advance of particular cases, thereby relegating the notion to the sphere of equity for all time.

Just as the Loop, when fairly understood, is a rather elegant way of achieving fairness, there is a case to be made for the necessity and the equity of the Hitch. It is very hard to state a positive rule in a naked and categorical form. Those little adverbial modifiers, like *knowingly*, import volumes of Hitches. On a somewhat higher scale, the rule without a few provisos is as rudimentary as the Decalogue. Hitches give all rules their clarity (if any), provide them with definition, and set their limits. When a well-conceived rule is able to capture the elements triggering its application, the Hitch will figure prominently in helping the draftsman to avoid such awkward, mealy-mouthed, and tongue-forking expressions as "*Sometimes*, a person who does X will be . . ." or "A person who X's *without lawful excuse*. . . ." It is not, however, the formal merits of the Hitch that require the admiration of those who would attain the sublime objective of fitting the rule to the fullest understanding of the case. Rather, it is the capacity of Hitches to deflect or intercept the logical outcome of a categorical rule in circumstances where the law risks being an ass. We need to be able to distinguish the case where a Hitch really does specify the limit of a rulemaker's intention from the case where it embodies an intention not to decide in advance of the data.

Reversals are harder to save from the imputation of treachery. A Reversal commonly involves the keying of a legally significant fact to more than one norm, as we have seen.[26] If it were possible to amplify the notice that the single proof is ambivalent, some kinds of difficulty would be minimized. Counsel would appreciate the dangerousness of piling up the demonstrations of irreparable harm while neglecting the force of those demonstrations as evidence that "where there is a wrong, there is a remedy [at law]."[27] The virtue of some Reversals, at least, is that they come closer than any other of the devices we have discussed to conforming the words of the law to its practices. There are dangers and trade-offs in any chosen course of action, not excepting the charted courses described in positive legal language describing rights and enti-

26. *See* E. GOFFMAN, FRAME ANALYSIS (1974).

27. The maxim is even codified. *See* CAL. CIV. CODE § 3523 (West 1970).

tlements. By suddenly changing the polarity of an argument or a proof, the Reversal provides a flash of sudden and genuine enlightenment—but this is a thrill that is most often purchased by seeming to spring traps on the unwary. We ought, therefore, to seek wherever possible for ways to transform the Reversal into a statement that looks more like a Hitch or a Loop. Besides its vulnerability to charges of being a trap, the Reversal is open to challenge on the ground that a truly ambivalent issue is never resolved by such tricks as the statement, "But counsel has proved too much . . . ." The fact that the court has the last say is no reason for giving it the edge. Perhaps if counsel were permitted to prove even more, the equities would resume their original appearance.

The Reversal will not figure prominently in our conclusions about the role of feedback in the refinement of legal doctrine, for the reasons stated. Before dropping this subject altogether, however, we must note the inadvisability of treating all Reversals as blemishes to be covered or cauterized at any cost from the visage of Justice. Only a Reversal can adequately capture the authentic instance of a legal paradox, the true dilemma, the quandary, that experience confronts us with collectively (as lawgiving and law-abiding persons) as often as it does individually. As an instance of this point, consider how one might express, as a rule, the grounds for one's judgment if presented with a choice between the alternatives posited in Newcomb's paradox.[28] A puzzle of such pure

28. The paradox may be stated as follows: Suppose yourself to be closely encountered by a stranger who informs you that he is visiting earth to confirm experimentally his hypothesis that the human mind is a very simple and predictable mechanism, so that he may complete his graduate studies. You are allowed to be a subject—the 100,000th subject, in fact—in his investigation by participating in a situation of choice that should be entirely profitable and painless. In your presence (and before witnesses of your choice) the creature exhibits $1,000,000 in cash and an additional $1,000 also in cash. He places the $1,000 in a box marked "A" on a table before you. Then, obscuring your vision but not that of the witnesses, he either places the $1,000,000 in a second box, marked "B," or else he does not do so. After that he leaves the room and gives you ample time to reflect on which of two options you may take: you may have and keep the contents of *both* boxes, "A" and "B," which will assure you of at least $1,000 gain, or you may elect to take only the contents of box "B." One other item of information: in all but .01% of the previous experiments, the subject's choice was correctly predicted by the creature. The creature has announced that his prediction of *your* choice, confidentially disclosed to your witnesses, has lead him to place $1,000,000 in box "B" *only if* the prediction is that you will elect to take box "B" alone. If the prediction was that you would elect to receive the contents of both boxes, "B" will have been left empty. Empty or full, both boxes are now in the control of your most trusted associates, who are unable to tell you what they know concerning the creature's actions.

For the original and more complete account of the paradox and its attempted solutions, see Gardner, *Mathematical Games*, SCIENTIFIC AM., July 1973, at 104.

form as Newcomb's will hopefully stimulate more introspection than an instance taken from the frailities of law.

No analyst of the paradox to date has come up with a reasoned choice for one of the options that is not entirely persuasive—and entirely refuted by the reasons for making the contrary choice.[29] As with many Reversals, however, at first appearance there seems to be but one rational choice to the person seeking to maximize gain. The paradox reveals a capacity for rationality itself to take on conflicting aspects and to work Reversals on what is perceived as the necessary outcome of logical thought.

III. Intuition, Verbalization, Discretion

'Unless' as a Qualification of Rules

All of the foregoing examples have been used by judges because of the inadequacy of one of the central particles of legal discourse. The dissections of the common forms of legal irony and the talk about the value of feedback are both mere criticisms of one ubiquitous word and of the more pervasive concept that it designates. The word is *unless*. Other expressions, like *provided*, also seek to introduce the contingencies and the qualifications that form the foundations of doctrines expressed in universal and categorical terms. There is probably no word more subtle than *unless*, and legal discourse offers nothing less capable of being instanced in advance of particular occasions.

The forms of *unless* can cover every kind of exception and qualification, and they may range over a series of values, starting with the value of great specificity ("unless the plaintiff be red of hair") to the value of nuance and shading ("unless the court is satisfied that *X* reasonably believed . . ."). Yet there is doubt regarding the performance of this term, and its relatives, in discharging its legal office. If that office is conceived as the statement of niceties and qualifications where our sense of justice and of stopping-points would have them placed, then why has the law so kindly embraced the strategy of prolixity? It seems as though the lawyers have almost invented prolixity in response

29. Many reason inductively from the high accuracy and the large sample of the creature's past predictions that he is highly unlikely to err on the present occasion. They therefore opt to take box "B" only. Others rely upon the irreversibility of physical causes and reason that the money in box "B" must remain there if it were left there at all, so that a decision to take the contents of box "A" may be reached freely and with impunity. This casting of a logical puzzle in terms that call for the exercise of prudential reasoning raises interesting issues for deterrence theory and other areas of the law, as well as the ones dealt with here.

to a well-grounded fear of the omitted exception, or the statement that excepts what should be included, through inadvertent omission of a term in an already prolix catalog of foreseen examples. The clause beginning with *unless* rarely simplifies the statement of which it forms a part.

Despite its faults, *unless* is a good compass for dividing a field. It is useful, for example, in offering grammatical parallels to the agonistic forms of procedure, handily dividing the elements of a prima facie case from defensive matter. Lending itself to divisions, and to dialectical forms, the term *unless* may sometimes help to simplify the expression of a complex rule by reducing the need for adverbs and adjectives in its governing clause. This strength in the traditional forms of legal statement is crucially dependent on a primitive style of thought that gains its clarity from tactics of division and apposition. In an important sense, the forms using *unless* to segregate the contingencies and qualifications surrounding an imperative statement depend on an ancient and unconscious analogy between law and geography.

When a rule is described by the metes and bounds of its exceptions, our concept of it takes the image of a "field" of application. The metaphors of geography and geometry, which generate the lore and the language of *meum* and *tuum* are ubiquitous. We can hardly escape thinking as solons with the same images that animated the thought of the original Solon. "Fields" are divisible through grants and reservations, and that is also how burdens are allocated (*i.e.*, assigned to a place), even though the rules we are speaking of are only procedural. Virtually every feature of the legal personality is conceived as a kind of tenure, a holding on to what belongs to one, as a matter of right.[30] It is as if the possessor of rights were seized of his individuality by some deed, depending upon an antecedent survey of the domain of persons, as subjects. There is no avenue of escape in the recasting of doctrine into "spheres" of autonomy and the like; such recasting merely transforms a world ruled by plane geometry into a space described by solid geometry. Nor will we become fully conscious of our debt to the etymology of our terms by adopting the positive stance that regards legal relations as "powers" to do or to be exempt from or to be able to require certain behaviors.

This effort at a purely social description of the phenomenon avoids

30. Sir Isaac Newton's usage is of interest as an example of the 17th century sense of "right." He speaks of the tendency of bodies in motion to describe "right" (*i.e.*, straight) lines. Legal right is still conceived of as a social relation by which possessors and possessions are connected by straight lines.

the more obvious images of space and its occupation. The rhetoric associated with power terminology, however, is often antilegal in its intent,[31] while remaining tied to the ancient references to mine and thine, as for example when words like "domination" come into play.[32] It is tempting to make a great issue out of the doctrine that is so confounded with the common vocabulary of the law that it can be brought to consciousness only with the aid of a dictionary[33]—but the object of our present remarks on the grammar and the language of legal discourse is rather more oblique. We wish to indicate how antithetical the tradition of geographical terminology is to the expression of norms with terms that are recursive or self-referent.

There is little room for multiple uses of the social realm, for shared values, and for party walls in a statement that first lays down the law and then qualifies its domain. As rights in real property are the paradigm for legal discourse in all other fields, we may be well aware of the subtlety with which diverse or overlapping interests can be accommodated through language of easement, reservation, and limitation. Even so, the skill of the lawyer is essential to translate the law's dogmatic dicta into the intricate adjustments of communal living. Those divisions and subdivisions of "legalese" attain a delicacy worthy of the later style of Henry James, as the master of opinion-giving borrows dogmas from the *unless* side of a complex legal doctrine in order to give specific, yet guarded, instructions on what *may* or *must* be done to accomplish a goal or avoid a penalty.

It is no longer correct, if ever it was, to say that the law knows no such thing as a lob:[34] that a stone may not be cast *molliter et molli manu*. That is not how one pleads, nor how one would codify the rules on battery. But the ability of lawyers to forbid all batteries, including lapidations, while still giving due consideration to the manner and force of a stone's trajectory is beyond question. We know the draftsmen can do it, because the rule that might distinguish lobs from pegs would turn upon a straightforward distinction, and it is for the policy-

31. The "classical" or bourgeois notion of legality is inconsistent with Marxist interpretations of law as the expression of power relationships.

32. *See, e.g.*, T. SCHROYER, CRITIQUE OF DOMINATION, PART II (1973).

33. The tremendous power and eloquence of reflections based upon etymological insights is attested to by the works of Hannah Arendt. See particularly *What is Authority?*, in BETWEEN PAST AND FUTURE 91 (1961). In a more directly legal vein, see Koffler, *The Assimilation of Law and Literature: an Approach to Metanoia*, in III A.S.L.A. FORUM 5 (1978).

34. *See* Cole v. Maunder, 2 Roll. Abr. 548 (K.B. 1635), *trans. in* J. AMES, CASES ON PLEADING 2 (1875).

maker to decide whether the distinction should amount to a cognizable difference.

Verbalizing Recognitions and Intuitions

While great skill and creativity may be shown in turning caveats into adjectives, the limits of expression are reached when the cognition to be formulated as a prescription of law is in fact only a re-cognition. The recursive rule that states that the award is to be given to the person whose proof is "just right" (in comparison to the cases made by adversaries) is dependent upon some prior notion of the golden mean. This intuition could come from Aristotle[35] or Goldilocks, but whether the issue is obscenity[36] or parental superiority or the excessiveness of a verdict, one can recognize only what one has seen already. The law cannot posit such an image whose counterpart will be confidently recognized when encountered in life; it can only invoke perceptions that have been given common form in the settled habits of a language group.

Much of legal instruction is devoted to the exposure and the ridicule of students' propensities to know what they see, without the mediation of a positive rule entitling one to use the faculties of recognition or intuition. The taboo against the gut reaction is rooted in a moral notion of the invidious. There can be no contest when the outcome is decided by the accidents of history or the qualities of contestants that come near, or miss, a mark that is only recognized. There can be no just measure at all without commensurable and properly adopted criteria of measurement.

Difficulties in dealing with recognitions and intuitions become much more intractable when the "standard" of law is similar to one of our introductory examples, sharing the feature of turning or folding back upon itself. The specific authorization in Federal Rule of Civil Procedure 65 to treat a hearing for a preliminary injunction as a plenary trial[37] is of interest here, as it marks a stage in the evolution of doctrine that may be generalized to other cases. Rule 65 contemplates a need to cope with emergent occasions on an emergency basis, when changes are occurring that could moot a claim of right based upon some antecedent status quo. The propriety of ordering a freeze in any

35. *See* ARISTOTLE, NICOMACHEAN ETHICS, bk. V, ch. 3.

36. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

37. "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application . . . ." FED. R. CIV. P. 65(a)(2).

given set of circumstances is always a matter of contention and doubt, for one party's stability is the other's change. The principles of equity have long required a balancing of the hardships and prediction of the likely outcome of a full-scale trial on the merits, as preconditions to the issuance of a preliminary injunction.[38] Our discussion of the *Catch-22* syndrome would lead us to predict what has in fact occurred: a tendency of the proofs incident to the application for a preliminary injunction to replicate the proofs presented in the hearing for a permanent injunction. Hence, we get the permissive treatment of what is nominally provisional as being in fact final. Inconveniences amounting to deprivation of due process (or at least of some otherwise available useful processes) may be imposed on a defending party if the real crux of a case is the issuance or denial of what is provisional in name but dispositive in fact.

Practice under Rule 65 has not yet come to a point of coalescence of the provisional and the final proceeding. Their "overlap" is neither mandatory nor complete. It is observable, however, that the distinction that is so clear in theory between relief *pendente lite* and the permanent injunction often breaks down in practice. So often, indeed, does this occur that the rule itself reflects and permits the redundancy between the two phases of a single lawsuit. The collapsibility of the steps toward injunctive relief generates pressure to treat the entire temporal and conceptual interval between the preliminary and the final stages as dispensable. This space of time is occupied by the normal "due" processes of discovery, pleading, and law and motion matters; when it is squeezed to the vanishing point, it is as if the same threshold served as both the entry and the exit of the courthouse. Justice, conceived as the full panoply of due process rights, is a mere facade when thus reduced to two dimensions—a stage flat or a movie set, instead of an arena where a real drama unfolds.

The resistance of experience to the bifurcations of theory is best accounted for in Rule 65 and similar cases by an element of duplicity that is necessarily included in the operation of the law. At the same time, the court must entertain reasonable speculations on the outcome

38. *See generally* Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978), and the formulation in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953) ("To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (*i.e.*, the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.").

of the plenary trial, weigh the irreversible effects of present action or inaction upon all litigants, and assess the prejudice likely to result from the haste and incompleteness of the knowledge assembled at early stages of the case. The same evidence, or the same kinds of evidence, bear on all three points.

The public interest in channeling disputes to the courts, moreover, is neatly counterbalanced by the risk that *any* help rendered without full advice in the premises is apt to be partisan and, therefore, selfish. Justice is not achieved by balancing or making trade-offs in such cases, but in electing to prefer one value above another. The value upheld by withholding preliminary injunctions until information is full enough to justify confidence that they are needed tends to make preliminary injunction hearings very little different from the plenary trials for which they are supposed to be overtures. Differences in form between the two types of hearing are smaller than those that distinguish preliminary injunctions from temporary restraining orders.[39] It is impossible to be categorical, however, because any particular cause may fall upon a scale approximating the haste and informality of the T.R.O. at one end and the plenary trial at the other. General formulation of the rule of rank in such a sliding scale is considered impossible. No one can specify in advance the quiddities that move the counter.

A norm that requires resolution of an issue such as the level of inquiry appropriate for a present justification of provisional relief is a norm that cries out for description in terms of "equilibrium" or "balancing." It would thus confirm that our means permit "readings" that are inconsistent while they remain consistent with the dictates of precedent or code. Verbalizations that are unthinkingly used to objectify this kind of norm (and to serve as reasons for specific results) fall naturally into the agonistic pattern of other legal discourse. The habits of lawyerly expression generate a host of correlative terms that invite that special kind of derision that is reserved for the *Catch-22*. There are divisions between the use of the same circumstances as a "sword" or as a "shield";[40] discriminations resulting in the characterization of the same act as feasance or as nonfeasance,[41] or the same order as

39. *See* FED. R. CIV. P. 65(b); SEC v. Frank, 388 F.2d 486, 490 (2d Cir. 1968) ("[W]here interlocutory relief is truly needed, Rule 65 demands such but only such thoroughness as a burdened federal judiciary can reasonably be expected to attain within twenty days.").

40. *See, e.g., Developments in the Law: Res Judicata*, 65 HARV. L. REV. 820, 865 (1952).

41. *See, e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 56, at 339 (4th ed. 1971) ("In theory the difference between the two is simple and obvious; but in practice it is not always easy to draw the line and say whether conduct is active or passive.").

mandatory or prohibitory.[42] Such pairs are nutritious fodder for the critic who wishes to toy with grammatical transformation of the tenses of black-letter statements or to change the focus of attention to the other side of the field, making foreground background as he circumambulates the scope of a catchy doctrine.

Important and valuable as such maneuvers may be for tidying the mansions of the law, they do not accomplish radical change or result in important insight. One generation clarifies its thought in a series of dichotomies that appear false or specious to its successors. The next generation restores sanity or clarity to legal expression by introducing its own metaphors, exemplified in the present era by the fetish for "balancing competing interests." The present exercise has, in its way, also been a contribution to the reinvention of the wheel, or renovation of the house of Libra—scales, blindfold, and all. However, the language of criticism, in any of its versions, and very likely the doctrine that it scrutinizes, too, are concerned ineffably with the understanding and attainment of a virtue that cannot be captured in positive fiats nor in revelations of the spirit that mediates or animates the social conceptions behind them.

When Discretion Supplants Norms

It must be humbly admitted that the virtue of fidelity to an announced norm, which is the essence of legality, does indeed require the postulation of as many cruxes as are necessary to define consequences or name the value of potentiating actions. Every invitation for a simpleton to pepper a brief with exultant "clearlys" is a kind of triumph for the crusade to make law general, invariable, intelligible to all. The virtue of true sophistication in legal matters is altogether different, however, both in its expression and in its implementation. Little is said of it, because it has dwelt in the casuistic *zwischenreich* of law and morals that history assigns to a chancellor.

The virtue of a chancellor is quite distinct from the virtue of fidelity to an announced norm. It is best understood as a virtue of discernment, of clear qualitative judgment in a realm of incremental differences. The finest subtlety of the faithful follower of the law is a form of rabbinical elegance that excites admiration and acquiescence; there-

42. *See, e.g.*, Township of South Fayette v. Commonwealth, 477 Pa. 574, 585, 385 A.2d 344, 350 (1978) (Pomeroy, J., concurring) ("In my view, the distinction between 'mandatory' and 'prohibitory' preliminary injunctions is largely illusory and one that we would do well to abandon."). The orthodox academic ridicule of the distinction is marshalled with citations in the Justice's concurrence.

fore, it is authoritative even when its detractors take sophistication for sophistry. The highest attainment of a chancellor can only be called wisdom or, in its mortal manifestations, soundness. Its presence is recognized but never demonstrated, as befits the pursuit of principles that have no clear edges. The authority that commands assent when the right judgment is spoken by the chancellor is rooted either in charisma or in tradition. Rationalization of the ruling (whether it is wise or foolish) is ritually prefaced with a recital that "cases differ." Yet, the consistency with powerfully determinant principles that illuminates a sound ruling is visible to the mind's eye no matter how inartful or even disingenuous its stated grounds appear to be upon verbal analysis.

The special kind of self-awareness called conscience in a chancellor (and in accounts of judging intended to be complete) is matched, as we have seen, by a necessary self-reference in the processes by which all seamless webs are woven, all meanings given voice. The subject of our concern here, a wry taxonomy of the most common legal ironies, was inspired by the challenge of initiation and transmission of a culture. The legal tradition is hard to maintain without a settled mode of reasoning and exegesis. We make the culture again and again by seeking a set of concepts stable enough to carry an evolving vision of eunomy into practice over appreciable spans of time. An irresolvable frustration in the work of the social engineer seen as bridge builder is posed by the antinomy that is implicated in the legal ideal. We demand that our materials be so rigid that ordinary minds may comply with the demands of a stated order, yet so flexible that the order's spirit may bend its letter.[43]

Conclusion

Our thesis has been that *sometimes*, the legal "point well taken" may be set with beautiful precision by a rule. The rule, however, fixes the point by according worth and merit to proofs, arguments, and doctrinal formulae that we have so far found no stable patterns for organizing, describing, normalizing. For this reason, the task of judgment is delegated to officials familiar with the cases made out by disputants and with the interests that guide the application of the ruling conception we all hold of the commonweal (as stated in written norms). Such familiarity is in semantic opposition to the formality of legal processes, but it has everything to do with the respect and the authority generally accorded to the judicial office. The gap filled by the judge is

43. *See* R. UNGER, KNOWLEDGE AND POLITICS 72-76 (1975).

one lying between general statements and particular applications. The space that it encloses is intimate as it is familiar. In it, there is no more freedom for the expression of individual predilections (under the vaguely pejorative cover of "discretion") than there is for a couple to live a lie year after year while sharing the same roof.

The presence of what we have at times called "feedback," along with our other occasions for irony at the expense of the legal order, is not meant to signal a belief that there is a significant sphere for the whimsical use of public authority, as some critics of "discretionary justice" would suggest. On the contrary, the kinds of clumsiness we have dealt with exhibit a healthy confidence that somewhere in our system of beliefs there is a place of convergence, a consensus, so strong that we may successfully deputize fallible beings to calculate the single, optimal result that derives from our laws as well as our mores. Sadly, too often the result must be taken on faith (until better tropes are found) as corresponding with the foreordained and, therefore, ascertainable decision of any and all equally honest and informed persons learned in the law. A decree (and a legal judgment insofar as it is ineluctably decretal) mirrors a final judgment that any of us would have reached from a perspective of historical omniscience, if it were attainable.

We strive to attain that ideal, peering through dark glasses and seeing something that words cannot express either before or after the law has run its course. All we know, in truth, is all that we commonly suppose: that the intuitions that inform judgment within the "parameters" of even the phoniest rationality are not usually at odds with the positive guidelines found in regulations and precedents. The principles of a law-respecting order, including the rights to advance notice, consistency in treatment, confrontation, and an adversary process of inquiry into fact, all can and do consist with the exercise of such essentially moral intuitions as those we have examined. This appears to be so because the determinacy that may be effectuated by a faithful allegiance to words and texts operates through obscure causes.

The mysterious privacy of deliberation—the work of chambers—normally enfolds and sustains the workings of a rational conscience. The faculty or intuition we call judgment is like a laboratory operated by alchemists: from its interiors we are brought results and encouraged with reports of progress in the search for the philosopher's stone. We may, indeed, delude ourselves in feeling comfort, as we generally seem to do, in these announcements, but our experience justifies trust in the safety of our practice of leaving the ceremented oracles of

order to their true ministry—the familiar magic of nuance and the empirical testing of nostrums hallowed by time.